IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 14393 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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VINODBHAI PANNALAL VIJ - Petitioner(s)
Versus
MINUBHAI DARBASHA & 122 - Respondent(s)

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Appearance :

MR DHARMENDRA D VYAS SR ADVOCATE WITH MR DHAVAL D VYAS for Petitioner(s) : 1,
MR DHIRENDRA MEHTA for Respondent(s) : 1 - 4.
MR TUSHAR MEHTA for Respondent(s) : 5 - 12.

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CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA

Date : 08/08/2006

ORAL JUDGMENT

1. **Rule.** Mr. Dhirendra Mehta, learned advocate appears and waives service of notice

of rule on behalf of respondent Nos.1 to 4 whereas Mr. Tushar Mehta, learned advocate appears and waives service of notice of rule on behalf of respondent Nos. 5 to 12.

2. By filing instant petition under Article 227 of the Constitution of India, the petitioner seeks to challenge the order dated 14.7.2006 rendered below application Ex.6 in Special Civil Suit No.230 of 2006 by the learned Third Additional Senior Civil Judge, Surat, by which the application filed by the petitioner under Order 26 Rule 9 of the Code of Civil Procedure ('the Code' for short) for appointment of Court Commissioner to draw Panchnama of the disputed property has been rejected.

3. On 26.4.1982 the petitioner entered into an agreement to sale for purchase of land bearing Survey No.60, new S.No.54/2

admeasuring 4400 sq.mt. of village Vesu at the rate of Rs.24/- per sq. yard and paid Rs.60,000/- to deceased Darbasha Patel. Said Darbasha Patel expired on 31.1.1999. On 9.1.2004 respondent Nos.1 to 4 sold the said property to respondent No.5. Respondent No.5 in turn sold the property to respondent Nos.6 and 7 on 17.1.2004 and on 1.4.2006 respondent Nos.6 and 7 sold the said property to respondent Nos.8 to 12.

4. The petitioner thereupon filed Special Civil suit No.230 of 2006 in the Court of learned Senior Civil Judge, Surat for specific performance of contract and for permanent injunction. In the said suit, th petitioner had also filed application Ex.6 praying for appointment of a Commissioner to prepare the panchnama about the position of the property in question and for making investigation. The learned trial Judge vide order dated 14.7.2006

rejected the said application Ex.6 giving rise to present petition.

5. This Court has considered the submissions advanced by Mr. Dharmendra Vyas, learned Senior Advocate with Mr. Dhaval D. Vyas, learned advocate of the petitioner, Mr. Dhirendra Mehta, learned advocate for respondent Nos.1 to 4 and Mr. Tushar Mehta, learned advocate for respondent Nos.5 to 12, perused the impugned order as well as the statutory provisions contained under Order 26 Rule 9 of the Code.

6. It is seen from the order impugned in this petition that the learned trial Judge has while deciding the application seeking appointment of Court Commissioner decided the lis between the parties not only at pre-trial stage but at the stage of hearing of Ex.5 seeking interim injunction during pendency of

the suit.

7. It may be noted that by appointing Court Commissioner, the Court is not deciding the lis between the parties. The Court Commissioners are normally appointed for the purpose of local inspection of the property which may be used for elucidating the matter in dispute or ascertaining the market value of the property or the amount of any mesne profit or damages or annual net profit. In instant case, from the perusal of the application Ex.6, it is seen that the reason assigned by the petitioner for appointment of Court Commissioner is that there may not be any dispute in future with regard to the suit property and for the purpose of ascertaining the actual position of the suit property prevalent at the time of filing of the suit.

8. In aforesaid view of the matter, according

to this court, the impugned order does not stand to scrutiny which is deserved to be quashed and set aside by granting application Ex.6 by appointing Court Commissioner as prayed for in the application Ex.6.

9. For the foregoing reasons, the petition succeeds and accordingly it is allowed with no order as to costs. The impugned order dated 14.7.2007 rendered below application Ex.6 in Special Civil Suit No. 230 of 2006 by the learned Third Additional Senior Civil Judge, Surat rejecting the application filed by the petitioner for appointment of Court Commissioner is hereby quashed and set aside, the result of which is that the application Ex.6 is granted. The learned Civil Judge (SD) shall appoint a Court Commissioner for preparing panchnama of the disputed property. It would be open for all the parties to file objection, if any, against the report of the

Court Commissioner.

10. While deciding the application Ex.6, according to this court, the learned trial judge has almost decided the lis between the parties and therefore it would be in the interest of justice that the learned principal District Judge, Surat is directed to transfer Special Civil Suit No.230 of 2006 to the Court of any other Senior Civil Judge from the one who has decided the application Ex.6 so that no prejudice can be caused to either of the parties.

11. It is made clear that this Court has not examined the merits of the matter. It is expected of the learned Senior Civil Judge before whom the matter will be placed for hearing of Ex.5, if any filed by the petitioner, and suit that he shall decide the same strictly in accordance with law on the

basis of the evidence that will be adduced before him.

12. Registry is directed to send a copy of this order to the learned Principal District Judge, Surat for necessary compliance of the direction contained in this order.

Rule is made absolute accordingly.

Direct service is permitted.

(A.M. Kapadia, J.)

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